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One for Twenty-Five: The Federal Courts Reverse a Decision of the NFL's Disability Board for the First Time since 1993 in *Jani v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*

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Casenote

ONE FOR TWENTY-FIVE: THE FEDERAL COURTS REVERSE A DECISION OF THE NFL'S DISABILITY BOARD FOR THE FIRST TIME SINCE 1993 IN *JANI V.* *BERT BELL/PETE ROZELLE NFL* *PLAYER RETIREMENT PLAN*¹

*"They're gladiators. When the game is over, these guys have to go home. And when it's over, a lot of them don't have a home to go to."*²

I. INTRODUCTION

It was impossible to miss Mike Webster on the football field.³ The six-foot, one-inch, 255-pound center, nicknamed "Iron Mike," anchored four Pittsburgh Steelers Super Bowl teams.⁴ Upon retiring in 1990, however, he fell into obscurity. Brain damage, caused by numerous head injuries suffered during his playing career, led to depression, failed business ventures, an arrest, and periods of homelessness.⁵

1. No. Civ. WDQ-04-1606, 2005 WL 1115250 (D. Md. Apr. 26, 2005), *aff'd*, 209 F. App'x 305 (4th Cir. 2006).

2. Greg Garber, *A Tormented Soul*, ESPN.COM, Jan. 24, 2005, <http://sports.espn.go.com/nfl/news/story?id=1972285> [hereinafter Garber, *A Tormented Soul*] (quoting Webster's ex-wife).

3. See Mike Webster, Member – Pro Football Hall of Fame, http://www.profootballhof.com/hof/member.jsp?player_id=227 (last visited Nov. 13, 2007) (summarizing Webster's National Football League ("NFL") career). Webster was drafted by the Pittsburgh Steelers in the fifth round of the 1974 draft. See *id.* He played fifteen seasons for the Pittsburgh Steelers and started every game for ten consecutive seasons. See *id.* In 1997, he was elected to the Pro Football Hall of Fame. See *id.*

4. See Mike Webster, Achievements Timeline, <http://www.mikewebster52.com/achievements/achievements2.html> (on file with author) (providing year-by-year list of Webster's NFL accomplishments).

5. See Greg Garber, *Wandering Through the Fog*, ESPN.COM, Jan. 27, 2005, <http://sports.espn.go.com/nfl/news/story?id=1972288> [hereinafter Garber, *Wandering*] (detailing Webster's post-NFL personal and public troubles); see also Chuck Finder,

In 1999 Webster applied for disability benefits under the National Football League's ("NFL") current Bert Bell/Pete Rozelle NFL Player Retirement Plan ("Plan").⁶ The NFL Retirement Board ("Board"), which administers the Plan, agreed that Webster was disabled from playing in the NFL, but it disagreed that Webster's condition permitted him to receive the highest level of benefits available to former players.⁷ Webster filed multiple appeals over the next few years. In 2003, the Board issued its final decision, which affirmed its original benefits determination.⁸ Webster, however, was unable to hear this decision, having succumbed to a heart attack the year before at the age of fifty.⁹ His estate, dissatisfied with the Board's final ruling, filed suit in federal court.¹⁰ The result: a reversal of the Board's decision, upheld by the Fourth Circuit, marking the first time a federal appeals court found the Board abused its discretion under the highly deferential abuse of discretion standard of review.¹¹

From a legal perspective, Webster's case illustrates two reasons why courts are reluctant to overturn Board decisions except under rare circumstances. First, the Board is considered a fiduciary under the Plan's language and, therefore, its decisions are subject to the highly deferential abuse of discretion standard of review.¹² The sec-

The Blame: It Falls on NFL, Not the Rooneys, PITTSBURGH POST-GAZETTE, March 13, 2005, available at <http://www.post-gazette.com/pg/05072/470866.stm> (stating Dan Rooney, former Steelers president, got Webster room at Hilton in Pittsburgh for three months after he heard Webster was sleeping at local Amtrak station).

6. See NFL Players Association, <http://www.nflpa.org> (last visited Nov. 13, 2007) (providing resources for former NFL players including retirement and disability information).

7. See *Jani v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, No. Civ. WDQ-04-1606, 2005 WL 1115250, at *3 (D. Md. Apr. 26, 2005) (stating NFL Retirement Board awarded Webster Football Degenerative Benefits, not Active Football Disability Benefits), *aff'd*, 209 F. App'x 305 (4th Cir. 2006).

8. See *Jani v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 209 F. App'x 305, 312-13 (4th Cir. 2006) (awarding Webster lower level of benefits).

9. See Greg Garber, *Sifting Through the Ashes*, ESPN.COM, Jan. 28, 2005, <http://sports.espn.go.com/nfl/news/story?id=1972289> [hereinafter Garber, *Sifting*] (noting date and cause of Webster's death).

10. See *Jani*, 2005 WL 1115250, at *4 (following Board's final decision, Webster's estate filed suit in federal court).

11. See Larry O'Dell, *Former NFL Player's Estate Wins Disability Benefits*, INS. J., Dec. 18, 2006, <http://www.insurancejournal.com/news/national/2006/12/18/75120.htm> (reporting Fourth Circuit unanimously upheld district court decision to pay Webster's estate over \$1.5 million in disability benefits).

12. See *Johnson v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 468 F.3d 1082, 1085 (8th Cir. 2006) (restating abuse of discretion is proper standard of review for Board decisions); see also RESTATEMENT (SECOND) OF TRUSTS § 187 (1959) (defining appropriate standard of review when discretion is conferred on trustee).

ond, related, reason is the presence of conflicting medical evidence in many disability benefits cases.¹³ Disability benefit awards often hinge on medical testimony. Courts have consistently stated that the Board does not have to follow the opinion of the majority of doctors, but only needs to make a determination based on “substantial evidence,” which can be the opinion of just one doctor.¹⁴

Although the opinion remains unpublished, Webster’s case is important to retired NFL players because it has generated significant publicity on this important matter.¹⁵ Recently, numerous former players, coaches, and other disgruntled representatives went to Capitol Hill to voice their criticisms regarding the actions of the Board and the National Football League Players Association (“NFLPA”). Their grievance was that the NFL’s behavior borders on neglect towards former players who helped to elevate the NFL to its present level of success.¹⁶ The facts of Webster’s case support this criticism; the Board ignored unanimous medical evidence stating that Webster’s disability was present at the time he retired from the NFL.¹⁷ In defense of its actions, the NFL has countered that football is a violent sport, players choose to participate, and the league has made substantial efforts to compensate disabled and retired players.¹⁸

13. See John Barr & Arty Berko, *Fighting for Benefits*, ESPN.COM, Feb. 8, 2007, <http://sports.espn.go.com/nfl/columns/story?id=2760591&lpos=spotlight&lid=tab2pos2> (listing conflicting medical opinions regarding cause of former NFL player Brent Boyd’s mental disability to exemplify this point).

14. See Jani v. Bert Bell/Pete Rozelle NFL Player Retirement Plan, 209 F. App’x 305, 313-14 (4th Cir. 2006) (“The Board’s discretion, however, is not unfettered. Its exercise must be supported by substantial evidence.”) (citing *Bernstein v. CapitalCare, Inc.*, 70 F.3d 783, 788 (4th Cir. 1995)).

15. See Greg Garber, *Family, Friends React to Webster Ruling*, ESPN.COM, Dec. 15, 2006, <http://sports.espn.go.com/espn/print?id=2697538&type=story> [hereinafter Garber, *Family, Friends React*] (explaining Webster’s suit as victory for all players asking NFL for benefits).

16. See John P. Lopez, *Pre-1977 NFL Players Fight for Better Pension*, HOUS. CHRON., Oct. 7, 2006 at 11, available at http://www.chron.com/CDA/archives/archive.mpl?id=2006_4205982 (“These were the guys who put the NFL on the map and made it the game it is today[.]”).

17. See Jani v. Bert Bell/Pete Rozelle NFL Player Retirement Plan, No. Civ. WDQ-04-1606, 2005 WL 1115250, at *6 (D. Md. Apr. 26, 2005) (summarizing that every examining doctor concluded that Webster’s disability was present when he retired), *aff’d*, 209 F. App’x 305 (4th Cir. 2006).

18. See Chuck Finder, *Webster vs. NFL: A Family’s Fight, Attorney is a Staunch Defender of the Plan*, PITTSBURGH POST-GAZETTE, March, 14, 2005, at D1 [hereinafter Finder, *Webster v. NFL*] (presenting other side of debate defending NFL’s Plan). Doug Ell, lawyer and administrator of the Plan, explains that the NFL will be unable to keep all retired players happy. See *id.* (defending Plan to critics). He goes on to state that the Plan pays out over \$1 million in disability benefits per month. See *id.* (noting that Plan still does much for retired players).

This Casenote uses *Jani v. Bert Bell/Pete Rozelle NFL Player Retirement Plan* to explore issues surrounding retired players seeking disability benefits under the Plan.¹⁹ Part II provides background on obstacles former NFL players face after their playing days, the procedure for applying for disability benefits, and a summary of selected suits filed by former players under the Employment Retirement Income Security Act of 1974 (“ERISA”).²⁰ Part III briefly summarizes the courts’ analyses in Webster’s case.²¹ Part IV takes a closer look at limitations of the abuse of discretion standard of review used by the United States Court of Appeals for the Fourth Circuit (“Fourth Circuit”) in this case.²² Part V provides a summary of the ongoing debate between former players and the NFL regarding disability benefits.²³ Finally, Part VI concludes that one solution to the problem may involve current players voicing former players’ concerns to the NFL in the next round of collective bargaining agreement negotiations.²⁴ Part VII was added as a Postscript to highlight the NFLPA’s recent initiatives in response to the public criticism over how it has previously administered disability benefits for former players.²⁵

II. BACKGROUND

A. Retirement: Adjusting to Life After Football

Players exiting the NFL often face a variety of difficulties in adjusting to life after football, and Mike Webster was no different. NFL players are accustomed to inflated salaries and an almost celebrity status, making transition into life as a somewhat anonymous

19. See *Sweeney v. Bert Bell NFL Player Retirement Plan*, 961 F. Supp. 1381, 1383 (S.D. Cal. 1997) (“The Plans are employee benefit plans covered by the Employee Retirement Income Security Act of 1974. . .”), *aff’d in part, rev’d in part*, 156 F.3d 1238 (9th Cir. 1998).

20. For a further discussion of the background of this Casenote, see *infra* notes 25-125 and accompanying text.

21. For a further discussion of the reasons why the district court reversed the Board’s decision, see *infra* notes 126-39 and accompanying text.

22. For a further discussion of two limitations the Fourth Circuit imposed on the Board in *Jani*, see *infra* notes 141-59 and accompanying text.

23. For a further discussion of the debate over benefits from both a former player’s perspective and the Board’s perspective, see *infra* notes 160-83 and accompanying text.

24. For a further discussion of the conclusion of the Casenote and its prompt to current players, see *infra* notes 184-90 and accompanying text.

25. For a further discussion of what the NFLPA has done to counteract this criticism, see *infra* notes 191-96 and accompanying text.

person difficult.²⁶ In addition, players are accustomed to living a very structured life while playing football; coaches are always telling players where to be and what to do, with team assistants handling many non-football related tasks.²⁷ Once out of the league, most players often find themselves on their own and required to find a job in corporate America.²⁸ Further, many former players must deal with injuries suffered during their playing days.²⁹ While the number of players experiencing injuries may be alarming, it is not surprising given that football is a physical and violent contact sport.³⁰

26. See Greg Garber, *Man on the Moon*, ESPN.COM, Jan. 26, 2005, <http://sports.espn.go.com/nfl/news/story?id=1972287> [hereinafter Garber, *Man on the Moon*] (commenting on why many football players struggle adjusting to life post-football).

To be a physical specimen of the head-turning order, to make vastly more money than ordinary people do and to live an appropriately out-sized lifestyle, to play in arenas filled with 60,000 adoring fanatics, to exist in an environment where people want to name their children after you — well, that can skew even a healthy sense of perspective.

Id.

27. See *id.* (explaining professional athletes live very structured lives). Webster's ex-wife, Pam, states she heard over sixty percent of marriages involving ex-football players fail due, in part, to the lack of structure for players once they retire. See *id.*

28. See Greg Garber, *Developing a New Game Plan*, ESPN.COM, Jan. 27, 2005, <http://sports.espn.go.com/nfl/news/story?id=1975331> (describing program created by former NFL player to assist players' adjustment to life after football). Stacey Robinson, former New York Giant and the NFLPA's director of player development, works with ex-NFL players to smooth the transition into the world beyond the football field. See *id.* For example, the NFLPA provides continuing education programs and career internships. See *id.* The NFLPA will also reimburse a player's tuition if he completes an undergraduate or master's degree. See *id.* Former athletes also have internet resources to aid their transition. See, e.g., GamesOver.org, <http://www.gamesover.org> (last visited Nov. 13, 2007) (creating online resource for ex-athletes attempting to adjust to life after sports).

29. See Greg Logan, *It's a Risky Business Football's Violence Often Takes a Late Toll on Players in the Form Of Long-Term Disability and – According to Some Studies – Premature Death*, NEWSDAY, Sept. 4, 1988, at 4 (providing findings from study of 700 former players by Ron Mix, former player and lawyer). An estimated fifty-one percent of pre-1970 players and sixty-six percent of post-1970 players have a permanent injury. See *id.* A 2001 study of retired NFL players by the Center for the Study of Retired Athletes at the University of North Carolina found that eighty-seven percent of players polled stated they suffered from depression and forty-six percent said they were taking anti-depressant medication. See Greg Garber, *A Game of Mortals*, ESPN.COM, Jan. 24, 2005, <http://sports.espn.go.com/nfl/news/story?id=1973574> (discussing results from 2001 study of former players). Another study, however, conducted in 1994 by the National Institute for Occupational Safety and Health ("NIOSH") found that football players live marginally longer lives than non-football players. See *id.* (explaining study was prompted by NFLPA). The NIOSH study also found, however, that offensive and defensive linemen had a six-times greater risk of heart disease as compared to men of normal size. See *id.*

30. See Chuck Finder, *NFL's Disability Plan Puts Former Players Under Close Scrutiny*, PITTSBURGH POST-GAZETTE, March 14, 2005, at D4 [hereinafter Finder, *NFL's*

1. *Webster's Failed Business Ventures and Financial Woes*

When Webster's retirement began in 1990, it seemed pleasant and filled with opportunity. He had invested wisely during his playing days and even considered pursuing careers in football and in non-football related areas, such as the business and medical fields.³¹ After a brief two-game stint as an NBC broadcaster, Webster and his family moved to his wife's hometown of Lodi, Wisconsin.³² Financial troubles began at this point: Webster allowed bills to pile up, stopped filing tax returns, and delved into his retirement savings.³³

Webster's financial woes worsened over the next ten years. In 1999, when Webster applied for disability benefits, the Board employed a private investigator to explore Webster's financial background.³⁴ The investigator compiled a report on Webster which was full of numerous bad business judgments and failed attempts at seeking employment.³⁵ After 1994, Webster's only source of income was money earned from autographing memorabilia.³⁶ Webster was also involved in a few lawsuits,³⁷ forcing him to use his four Super Bowl rings as collateral.³⁸ In addition, Webster became

Disability Plan] (acknowledging drawing lines for which players should be compensated for their injuries is difficult). Of the more than 3,500 NFLPA members, an estimated 232 receive disability benefits. See Finder, *Webster v. NFL*, *supra* note 18 (explaining of 232 members receiving benefits, 104 receive partial benefits and 128 receive full disability).

31. See Garber, *Man on the Moon*, *supra* note 26 (showing Webster seemed optimistic about his opportunities when he first retired in 1991). Webster considered becoming a coach, chiropractor, or stockbroker. See *id.*

32. See *id.* (marking beginning of Webster's downward spiral). In 1991, Webster announced two preseason games on NBC and was offered a contract, however, Webster declined the offer because of the move. See *id.*

33. See *id.* (noting contrast in Webster's mental state before and after retirement). Webster went from knowing the tax laws in every state to not paying income taxes for the last eleven years of his life. See *id.* The bank foreclosed on his house within eighteen months after he moved his family to Lodi, Wisconsin. See *id.*

34. See *id.* (stating Board hired Thomas A. Keating, investigator, to explore Webster's financial background).

35. See *id.* (providing list of Webster's failed business ventures). Webster formed and was involved in numerous business ventures that failed including Webster Asset Management Trust, funded with a \$230,000 capital contribution from Webster. See *id.*

36. See Garber, *Wandering*, *supra* note 5 (explaining Webster's friend, Sunny Jani, would book Webster at Pittsburgh area autograph shows).

37. See Garber, *Sifting*, *supra* note 9 (noting recent settlement of lawsuit involving Webster's former business partner); see also Finder, *Webster v. NFL*, *supra* note 18 (explaining Webster's other legal troubles). In April 2003, a couple won a civil lawsuit against Webster resulting from an earlier car accident. See *id.* As of 2005, Webster's estate also owed over \$250,000 in back taxes to the IRS. See *id.*

38. See Garber, *Family, Friends React*, *supra* note 15 (explaining part of disability award will be used to recover Webster's four Super Bowl rings and Pro Football Hall of Fame ring which are being held by attorney as collateral). The rings were

homeless for the last years of his life and was forced to sleep in his car, motels, or at friends' houses.³⁹

2. *Injuries Take Their Toll on 'Iron Mike'*

At the time of Webster's retirement, his knees and right shoulder were permanently ruined and he suffered from constant headaches.⁴⁰ These headaches worsened in intensity and frequency after his retirement.⁴¹ Webster took a variety of pain medications to combat these symptoms, paid for them out of his own pocket, and sometimes out of sheer desperation used a taser gun on himself to fall asleep.⁴² In 1996, a psychiatrist examined Webster and reported that Webster suffered from despair, constantly thought about suicide, and noted that Webster confessed to spending days curled up in the fetal position.⁴³ When Webster applied for disabil-

used as collateral to post \$2,000 bail after Webster's arrest for forging prescriptions for Ritalin. See Garber, *Wandering*, *supra* note 5.

39. See Garber, *Wandering*, *supra* note 5 (detailing Webster's extended periods of homelessness during final years of his life); see also Garber, *Man on the Moon*, *supra* note 26 (reporting Webster would sleep "wherever it was warm and people wouldn't disturb him . . .").

40. See Greg Garber, *Blood and Guts*, ESPN.COM, Jan. 25, 2005, <http://sports.espn.go.com/nfl/news/story?id=1972286> (providing partial list of Webster's injuries). Webster broke almost all of his fingers and suffered permanent damage to five vertebrae. See *id.* After an MRI a physician asked Webster if he had ever been in a car accident because he showed similar symptoms to a person in that condition. See *id.* It is estimated that Webster suffered 25,000 violent collisions during his career. See *id.* Although Webster never reported nor was never treated for any concussions, doctors estimate Webster sustained multiple concussions. See *id.* Another ex-Pittsburgh Steeler, Merrill Hoge, won a successful lawsuit against a Chicago Bears team physician for failing to warn him about the dangers of concussions and negligently allowing Hoge to continue playing without an adequate follow-up examination. See Alexander N. Hecht, *Legal and Ethical Aspects of Sports-Related Concussions: The Merrill Hoge Story*, 12 SETON HALL J. SPORTS L. 17, 25-30 (2002) (exploring sports-related concussion litigation through scope of Hoge's case).

41. See Garber, *Wandering*, *supra* note 5 (describing his headaches to physician, Webster said they were "blowing the top of [my] head off"). Webster was particularly susceptible to being hit in the head by opposing teams because of the "head slap." See *Jani v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, No. Civ. WDQ-04-1606, 2005 WL 1115250, at *1 (D. Md. Apr. 26, 2005) (defining "head slap"), *aff'd*, 209 F. App'x 305 (4th Cir. 2006). Defensive linemen would start their rush by slapping the center on the top of his head while he was still bending over to hike the ball in an effort to disorient him. See *id.* The NFL banned this technique in 1977, however, numerous defensive players continued to use the "head slap." See *id.*

42. See Garber, *A Tormented Soul*, *supra* note 2 (explaining that use of taser gun on himself was sometimes only way Webster could escape pain and fall asleep).

43. See Garber, *Man on the Moon*, *supra* note 26 (paraphrasing diagnosis of Dr. Jerry Carter). Dr. Carter examined Webster in 1996 and produced a comprehensive psychological profile on Webster. See *id.* Former teammates prompted Webster to be evaluated after they found him sleeping in a train station. See *Jani v. Bert*

ity benefits he was examined by multiple doctors who concluded that he suffered brain damage from playing football.⁴⁴ Webster ultimately passed away on September 24, 2002, from a heart attack.⁴⁵

B. The NFL Retirement Plan

The current Plan is a product of the 1993 collective bargaining agreement between the National Football League Management Council ("NFLMC") and the NFLPA, which merged the then-existing Bert Bell NFL Player Retirement Plan into the current Plan.⁴⁶ In addition, a new Supplemental Disability Plan was established.⁴⁷

Bell/Pete Rozelle NFL Player Retirement Plan, 209 F. App'x 305, 310 (4th Cir. 2006).

44. See *Jani*, 209 F. App'x at 310-11 (summarizing medical opinions of examining physicians). Dr. Vodvarka examined Webster in late 1997 and concluded he might be suffering from post-concussion syndrome. See *id.* at 310. Dr. Kricg, a psychologist examined Webster and stated he suffered from brain damage – "dementia resulting from his football-related head traumas." See *id.* Further, Dr. Himmelhoch stated that Webster suffered from encephalopathy. See *id.* at 311. A recent study by the University of North Carolina's Center for the Study of Retired Athletes determined that the rate of diagnosed clinical depression is closely correlated with the number of concussions sustained by an NFL player. See Alan Schwarz, *Concussions Tied to Depression in Ex-N.F.L. Players*, N.Y. TIMES, May 31, 2007, <http://www.nytimes.com/2007/05/31/sports/football/31concussions.html> [hereinafter Schwarz, *Concussions*] (discussing results of recent study which examined effects of concussions on retired players). The study found that 20.2 percent of 595 players who sustained three or more concussions while playing football suffered from depression. See *id.* Meanwhile, the NFL has continued to discredit any link between head injuries and depression. See *id.*

45. See Garber, *A Tormented Soul*, *supra* note 2 (noting Webster passed away from heart failure at age of fifty). Although a 1994 study by NIOSH stated that NFL players live marginally longer than non-football players, more recent studies suggest the average life expectancy of NFL players is fifty-five and that linemen have a life expectancy closer to fifty-two. See Joanne Korth, *A Huge Problem*, ST. PETERSBURG TIMES, Jan. 29, 2006 at 1C, available at http://www.sptimes.com/2006/01/29/Sports/A_huge_problem.shtml (suggesting life expectancies of former NFL players are shorter than previous studies have indicated). The life expectancy of a NFL player is significantly below 77.6 years, the life expectancy of the average American person. See *id.*

46. See *Sweeney v. Bert Bell NFL Player Retirement Plan*, 961 F. Supp. 1381, 1383 (S.D. Cal. 1997) (chronicling history of Plan), *aff'd in part, rev'd in part*, 156 F.3d 1238 (9th Cir. 1998). The Bert Bell NFL Player Retirement Plan was established in 1962. See *id.* The Pete Rozelle NFL Player Retirement Plan was established in 1989. See *id.* The two plans were merged into the current Plan in 1994. See *id.* For an in-depth history of the NFL's retirement plan see NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, HISTORY OF RETIREMENT AND T&P BENEFITS FOR NFL PLAYERS (2006), http://www.nflpa.org/pdfs/NewsAndEvents/History_of_the_NFLPA's_Retired_Player_Benefits.pdf (last visited Nov. 13, 2007).

47. See *Sweeney*, 961 F. Supp. at 1383 (explaining establishment of Supplemental Disability Plan during 1993 CBA). Internal Revenue Service regulations required the NFL to establish the Supplemental Disability Plan because the existing Plan could not offer all of the increased benefits stemming from the 1993 CBA. See *Dial v. NFL Player Supplemental Disability Plan*, 174 F.3d 606, 609 (5th Cir. 1999) (explaining why Supplemental Plan was established). The Supplemental

All NFL players are automatically enrolled in the Plan which provides them with a pension and disability benefits.⁴⁸ This section summarizes how the Plan defines injuries, explains the process for applying for disabilities, and concludes with a recap of Webster's applications for disability.

1. *Definition of an Injury Under the Plan*

The Plan provides for a variety of disability benefits including Line of Duty Benefits and Total and Permanent Benefits.⁴⁹ Total and Permanent Benefits are broken into four categories: Active Football, Active Non-football, Football Degenerative, and Inactive.⁵⁰ To qualify for these benefits a player must suffer from a total and permanent disability ("T&P disability") as defined by the Plan.⁵¹ The requirement that the disability prevents a player from engaging in any type of employment is central to the definition of T&P disability.⁵² Also, in order for a player to qualify for these benefits, the player must suffer the T&P disability "shortly after" the disability first arose; another term defined in the Plan.⁵³ Therefore,

Disability Plan awards additional benefits to players that already qualify for benefits under the Plan. *See Sweeney*, 961 F. Supp. at 1384.

48. *See Jani*, 209 F. App'x at 306, n.1 (informing that NFL enrolls all players in Plan and NFL Supplemental Disability Plan). A player's monthly pension is determined based on the number of years a player plays in the league. *See* NFL Players Association – Rules and Regulations – Player Benefits, <http://www.nflpa.org/RulesAndRegs/PlayerBenefits.aspx> (last visited Nov. 13, 2007) (providing formula for calculating credits based on number of seasons played). A player earns a credit for every year that he plays in at least three games during the season. *See id.* (noting player can be on active list, injured active reserve list, or physically unable to perform/football list to earn these credits). Players are eligible to begin collecting a pension at age fifty-five. *See id.*

49. *See* NFL Players Association – Rules and Regulations – Player Benefits, *supra* note 48 (listing different types of benefits available to NFL players). The most recent collective bargaining agreement initiated a Line of Duty Disability. *See id.* Line of Duty Disability benefits compensate players that were forced to retire from their injuries, however, the injuries do not classify the player as totally and permanently disabled. *Id.*

50. *See* NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, NFLPA WHITE PAPER ON BENEFITS (2007), http://www.nflpa.org/whitepaper/NFLPA_White_Paper.pdf at 5-6 (providing definitions of four types of T&P disability benefits).

51. *See Jani v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, No. Civ. WDQ-04-1606, 2005 WL 1115250, at *2 (D. Md. Apr. 26, 2005) (defining T&P injury), *aff'd*, 209 F. App'x 305 (4th Cir. 2006). "A player will be deemed [to have a T&P injury] if the Retirement Board finds that he has become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit." *Id.*

52. *See id.* (highlighting exception to lack of employment for disability payments). A player will not be considered employed if the player is employed by the NFL or by any employer out of benevolence. *See id.*

53. *See Jani*, 209 F. App'x at 309 (defining "shortly after" in Plan). The Plan uses a three-tiered scheme of presumptions based on six-month increments. *See id.*

medical and financial records become pivotal in the Board's determination of disability benefits.⁵⁴

2. *Applying for Disability Benefits*

To apply for disability benefits, a player submits a written application to the Disability Initial Claims Committee ("DICC").⁵⁵ In addition, the player is examined by a Plan-neutral physician.⁵⁶ The DICC then decides whether benefits should be awarded based on the player's application and medical evaluation.⁵⁷ If the player's disability claim is rejected or the player is unhappy with the DICC's decision, the player may appeal the decision to the Board.⁵⁸ The Board consists of six members: three members representing the owners and three members representing the players.⁵⁹ The Board, as a fiduciary of the Plan, has "full power, authority and discretion to interpret the Plans."⁶⁰ An appeal to the Board requires a player to undergo at least one additional medical examination by a Plan-

A player who becomes totally and permanently disabled no later than six months after a disability(ies) first arises will be conclusively deemed to have become totally and permanently disabled "shortly after" the disability(ies) first arises, . . . and a Player who becomes totally and permanently disabled more than 12 months after a disability(ies) first arises will be conclusively deemed not to have become totally and permanently disabled "shortly after" the disability(ies) first arises. . . . In cases falling within this six- to twelve-month period, the Retirement Board will have the right and duty to determine whether the "shortly after" standard is satisfied.

Id.

54. *See id.* at 310-11 (listings materials Webster submitted to Board including post-retirement medical records and affidavit explaining that he had been unable to work since retirement). *See id.*

55. *See NFLPA WHITE PAPER*, *supra* note 50 at 7-8 (sending application to Plan office in Baltimore, Maryland is first step in applying for benefits); *see also* Finder, *Webster v. NFL*, *supra* note 18 (claiming many retired players are unaware disability benefits even exist). Former players must file a disability claim within twelve years of their final season or by age forty-five. *See id.*

56. *See NFLPA WHITE PAPER*, *supra* note 50 at 8 (requiring medical examination as part of application process). A written report is issued by the neutral physician which comments on a player's condition and his ability to work. *See id.*

57. *See id.* (describing role of Disability Initial Claims Committee). The Disability Initial Claims Committee ("DICC") is comprised of two members. *See id.* One member is appointed by the NFLPA and the other member is appointed by the NFL. *See id.*

58. *See id.* (outlining appeals process from decisions of DICC). If the DICC is deadlocked on a decision, the player's disability claim will be denied and the player may appeal to the Board. *See id.*

59. *See id.* (providing names and background on current Board members).

60. *Sweeney v. Bert Bell NFL Player Retirement Plan*, 961 F. Supp. 1381, 1384 (D. Cal. 1997), *aff'd in part, rev'd in part*, 156 F.3d 1238 (9th Cir. 1998). The Board conducts its own investigation and does not give deference to the DICC's decision. *See NFLPA WHITE PAPER*, *supra* note 50 AT 9 (reiterating autonomy of Board).

neutral physician and will often require a player to submit financial records to prove that the disability has prevented him from working.⁶¹ The Board may also hire a private investigator to verify this information.⁶² If the Board is deadlocked on a decision, it can refer the dispute to a Medical Advisory Physician (“MAP”) whose medical opinion of a player’s condition will be binding on the Board.⁶³ After conducting an independent review of a player’s file, the Board will issue a final determination stating whether a player is entitled to receive benefits and, if so, what type of benefits will be awarded.⁶⁴ A player may file suit in federal court if he is still unhappy with the Board’s final determination.⁶⁵

3. *Webster’s Applications to the Board for Disabilities*

Webster applied to the Board for disabilities in 1999.⁶⁶ He applied for Active benefits and, in the alternative, Degenerative benefits.⁶⁷ As part of his application, Webster submitted three medical reports from different doctors claiming that he was T&P disabled as a result of brain damage suffered while playing football.⁶⁸ Webster also submitted financial information showing that he was unable to perform any services while employed by the Kansas City Chiefs.⁶⁹

61. See NFLPA WHITE PAPER, *supra* note 50 AT 9 (stating medical examination is required by federal law). See also Finder, *Webster v. NFL*, *supra* note 18 (placing burden of proof on player). “It’s a pretty high standard to reach: One can’t hold any meaningful employment.” *Id.*

62. See Finder, *Webster v. NFL*, *supra* note 18 (explaining role of investigator). An investigator is often hired to delve into a player’s medical and financial records and to verify that a player has not been employed. See *id.*

63. See *Johnson v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 468 F.3d 1082, 1084 (8th Cir. 2006) (defining role of Medical Advisory Physician (“MAP”) in disability benefit determinations). For a discussion of the somewhat unresolved issue of whether the Board must accept a MAP’s determination of whether a player is T&P disabled and the MAP’s determined onset date for the T&P disability, see *infra* note 181 and accompanying text.

64. See NFLPA WHITE PAPER, *supra* note 50 at 8-9 (summarizing role of Board in appeals process).

65. See *id.* at 9. For a further discussion of why players must file suit in federal court, see *infra* note 79 and accompanying text.

66. See *O’Dell*, *supra* note 11 (noting first time Webster applied for benefits); see also Garber, *Wandering*, *supra* note 5 (explaining Webster first considered applying for benefits in 1995, but never did so).

67. See *Jani v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 209 F. App’x 305, 310 (4th Cir. 2006) (showing Webster’s initial application listed both types of benefits).

68. See *id.* at 310-11 (summarizing medical opinions of Dr. Krieg, Dr. Vodvarka, and Dr. Himmelhoch). All three doctors concluded that Webster was T&P disabled. See *id.*

69. See *id.* at 311 (quoting Webster explaining his inability to keep any type of employment, even employment out of benevolence). But see Garber, *Man on the Moon*, *supra* note 26 (noting records show Kansas City Chiefs employed Webster as

The Board required Webster to be examined by a doctor of its choosing, who subsequently reached the same conclusion as the other doctors that had previously examined Webster.⁷⁰

On November 5, 1999, the Plan awarded Webster Football Degenerative benefits.⁷¹ Webster immediately appealed the decision.⁷² The Board denied his appeal on May 8, 2000, stating that while Webster was now T&P disabled, he was not T&P disabled 'shortly after' his injury arose.⁷³ In July 2000, Webster again appealed the Board's decision. To bolster this appeal, he submitted supplemental reports from three of the physicians that examined him, all stating that Webster was T&P disabled at the time he retired from football.⁷⁴ On March 17, 2003, the Board found that Webster had been appropriately awarded Degenerative benefits and that he did not become T&P disabled until September of 1996.⁷⁵

Webster's estate filed a final appeal in April 2003.⁷⁶ The Board denied this last appeal stating that the medical opinions of the three examining doctors were 'speculative and conclusory.'⁷⁷ Web-

strength and conditioning coach in 1994). Webster later described his employment with the Chief as follows, "[I had no] specific coaching duties but was there supposedly to help out if necessary." *Jani*, 209 F. App'x at 308.

70. See *Jani v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, No. Civ. WDQ-04-1606, 2005 WL 1115250, at *3 (D. Md. Apr. 26, 2005) (summarizing medical testimony of Dr. Edward Westbrook, physician selected by Board), *aff'd*, 209 F. App'x 305 (4th Cir. 2006). Dr. Westbrook concluded Webster had been T&P disabled as a result of multiple head injuries and that his disability started in March 1991 or earlier. See *id.*

71. See *id.* at *3 (awarding Degenerative benefits to Webster). A player who last played in the league in 2003 would earn \$110,000 per year under this type of benefits. See NFL Players Association – Rules and Regulations – Player Benefits, *supra* note 48 (providing example of annual disability payout for this category of T&P disability).

72. See *Jani*, 2005 WL 1115250, at *3 (explaining Webster appealed Board's initial decision and argued higher, Active benefits were appropriate). The Board did not initially set an onset date for the T&P disability. See *id.*

73. See *id.* (explaining Board's reasoning for denial of appeal). The Board interpreted Dr. Westbrook's report as stating that Webster's disability arose "shortly after" he retired, but the Board did not think Webster became T&P disabled at that time. See *id.*

74. See *id.* (describing Webster's second appeal). Webster included supplemental reports from Dr. Krieg, Dr. Himmelhoch and Dr. Westbrook. See *id.* The Board also requested Social Security and Internal Revenue records. See *id.* at *4.

75. See *id.* at *4 (outlining reasoning behind Board's decision). The Board stated that Webster became T&P disabled in 1996 based on a report by Dr. Marks, an oncologist that had examined Webster. See *id.*

76. See *id.* at *4 (providing date of Webster's final appeal).

77. See *Jani*, 2005 WL 1115250, at *4. (noting Board's final decision). The Board stated that doctors Westbrook, Krieg, and Himmelhoch did not examine Webster until 1998 or 1999, which were multiple years after Webster retired. See *id.*

ster's estate promptly filed suit in federal court to appeal the Board's final decision.⁷⁸

C. ERISA Litigation and Appropriate Standard of Review

ERISA allows an employee to file suit in federal court to recover pension benefits.⁷⁹ The Plan falls within the scope of ERISA because it is an employee pension benefit plan as defined by the statute.⁸⁰ This subsection examines the standard of review courts employ when reviewing an ERISA case - an issue that is often litigated and determinative in a case filed under this statute.⁸¹

1. *Birth of the Standard of Review: Firestone Tire and Rubber Co. v. Bruch*⁸²

The standard of review for courts reviewing ERISA complaints is not included in the statute's text, but instead has evolved from numerous court opinions including the Supreme Court's decision in *Firestone*.⁸³ Prior to *Firestone*, most circuits employed an arbitrary

78. *See id.* (providing filing date in district court of May 21, 2004). Sunny Jani, administrator of Webster's estate filed suit in the United States District Court of Maryland. *See id.* at *1.

79. *See* 29 U.S.C. § 1132 (2007) (listing available types of suits under ERISA). Federal court is the proper venue for ERISA claims. *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 207 (2004). To determine if a case arises under federal law, the "well pleaded complaint" rule is used. *See id.* An exception to this rule occurs when a federal statute, such as ERISA, completely displaces state law by pre-emption. *See id.* Then, a state claim can be removed to federal court. *See id.*

80. *See* *Courson v. Bert Bell NFL Player Retirement Plan*, 75 F. Supp. 2d 424, 427 (W.D. Pa. 1999) (stating Plan is employee pension benefit plan and therefore regulated by ERISA statute), *aff'd*, 214 F.3d 136 (3d Cir. 2000); *see also* 29 U.S.C. § 1002(2)(a) (2007) (defining employee pension benefit plan). "[A]ny plan, fund, or program which . . . is hereafter established or maintained by an employer or by an employee organization . . . [and] (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond" *Id.*

81. *See* JAIME RUTH EBENSTEIN & MARK E. SCHMIDTKE, *ERISA LITIGATION PRIMER*, Ch. 4, Section I (DRI 2004) (1992) (stating importance of standard of review to ERISA claim). The standard of review dictates the amount of deference a court will give to the fiduciary's decision and the scope of evidence the court may consider. *See id.* Compare BLACK'S LAW DICTIONARY 864 (8th ed. 2004) (defining *de novo* standard of review) with BLACK'S LAW DICTIONARY 11 (8th ed. 2004) (defining abuse of discretion).

82. 489 U.S. 101 (1989).

83. *See* EBENSTEIN & SCHMIDTKE, *supra* note 81 at Ch. 4, Section II (stating prevailing standard of review among circuits before *Firestone*). ERISA does not state the appropriate standard of review for civil actions brought under the statute. *See id.*

and capricious standard when reviewing all benefits determinations.⁸⁴

In *Firestone*, the majority of the Court rejected application of an arbitrary and capricious standard of review for all benefits determinations, holding instead that *de novo* is the proper standard of review “unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.”⁸⁵ The Court, however, did not specify the type of contractual language that would give a plan administrator this discretionary authority.⁸⁶ After *Firestone*, most Circuits abandoned the arbitrary and capricious standard of review in favor of an abuse of discretion standard of review when the benefits administrator has discretionary authority.⁸⁷

2. *The Board is a Fiduciary and Entitled to an Abuse of Discretion Standard of Review*

The Board is considered a fiduciary under ERISA.⁸⁸ As a result, the appropriate standard of review for the Board’s decisions

84. See *id.* (utilizing arbitrary and capricious standard before *Firestone*). Federal courts adopted the arbitrary and capricious standard of review based on similar language in the Labor Management Relations Act (“LMRA”). See *id.* Section 302(c)(5) of the LMRA discusses the duty of loyalty of trustees. See *Struble v. New Jersey Brewery Employees’ Welfare Trust Fund*, 732 F.2d 325, 333 (3d Cir. 1984) (highlighting similarities in language between LMRA and ERISA when defining duty of loyalty for trustees).

85. See *Firestone*, 489 U.S. at 115 (restating Court’s holding regarding appropriate standard of review for court’s review of ERISA claims). This holding was based on settled principles of trust law. See EBENSTEIN & SCHMIDTKE, *supra* note 81 at Ch. 4, Section II.

86. See EBENSTEIN & SCHMIDTKE, *supra* note 81 at Ch. 4, Section IV (noting questions remained unanswered following Court’s decision in *Firestone*). Circuits will examine the power granting clauses and whether a board’s decision is final and binding to determine if board should be granted fiduciary status. See *id.*

87. Compare *Smith v. Cont’l Cas. Co.*, 369 F.3d 412, 417 (4th Cir. 2004) (applying abuse of discretion standard of review), *Jebian v. Hewlett-Packard Co. Employee Benefits Org. Income Prot. Plan*, 310 F.3d 1173, 1177 (9th Cir. 2002) (applying abuse of discretion standard of review), and *Layes v. Mead Corp.*, 132 F.3d 1246, 1250 (8th Cir. 1998) (applying abuse of discretion standard of review), with *Hullett v. Towers, Perrin, Forster & Crosby, Inc.*, 38 F.3d 107, 114 (3d Cir. 1994) (employing arbitrary and capricious standard of review). Many circuit courts, including the Third Circuit in *Hullett*, have stated that the arbitrary and capricious and abuse of discretion standards of review are similar, while other circuit courts have maintained the standards are not identical. See EBENSTEIN & SCHMIDTKE, *supra* note 81 at Ch. 4, Section IV.

88. See 29 U.S.C.A. § 1002(21)(a) (2007) (defining fiduciary). ERISA defines a fiduciary as an entity that: (1) exercises discretionary control over management of plan or management or disposition of plan assets, (2) renders investment advice with respect to any money in the plan; and (3) has discretionary authority in the administration of the plan. See *id.*

after *Firestone* is an abuse of discretion standard.⁸⁹ Abuse of discretion is a deferential standard of judicial review and reflects the courts' hesitancy to interfere with decisions of a plan administrator when it is considered to be a fiduciary.⁹⁰ Circuit courts will affirm the decision of a fiduciary if "a reasonable person *could* have reached a similar decision, . . . not that a reasonable person *would* have reached that decision."⁹¹

A plan administrator's decision must be supported by substantial evidence.⁹² Further, it is not an abuse of discretion if a plan administrator denies benefits when there is conflicting evidence present.⁹³ Nonetheless, the conflicting evidence on which the plan administrator bases its decision must be substantial.⁹⁴

89. See *Johnson v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 468 F.3d 1082, 1085 (8th Cir. 2006) (utilizing abuse of discretion standard of review). The Board has discretion in construing the terms of the Plan and determining eligibility for benefits. See *id.* See also RESTATEMENT (SECOND) OF TRUSTS § 187, supra note 12 (concluding abuse of discretion is proper standard of review for fiduciaries). At least two NFL players have attempted to argue that a stricter standard of review should apply because the Board is operating under a conflict of interest. See *Johnson*, 468 F.3d at 1086; see also *Courson v. Bert Bell NFL Player Retirement Plan*, 75 F. Supp. 2d 424, 431 (W.D. Pa. 1999), *aff'd*, 214 F.3d 136 (3d Cir. 2000) (arguing abuse of discretion standard of review is too deferential because Board acts under conflict of interest). The *Firestone* Court stated that if a fiduciary is acting under a conflict of interest, the conflict must be weighed as a factor when determining if there is an abuse of discretion. See *Firestone*, 489 U.S. at 115. In *Johnson*, the court dismissed the argument that a less deferential standard of review should be used on the basis that the Board is neutral because its membership includes an equal number of representatives chosen by players and management and they must reach a majority decision. See *Johnson*, 468 F.3d at 1086. Similarly, the court in *Courson* reached the conclusion that the Board does not operate under a conflict of interest. See 75 F. Supp. 2d at 431 (finding no conflict of interest because contributions to Plan are fixed and held by separate trustee, and used solely for benefit of players or their beneficiaries).

90. See *Johnson*, 468 F.3d at 1085 (quoting *Layes v. Mead Corp.*, 132 F.3d 1246, 1250 (8th Cir. 1998)) (providing policy reason for deferential standard of review).

91. *Id.* (quoting *Wise v. Kind & Knox Gelatin, Inc.*, 429 F.3d 1188, 1190 (8th Cir. 2005)).

92. See *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (defining substantial evidence). Substantial evidence is more than "a mere scintilla of evidence." *Id.* However, it is less than the "weight of the evidence." *Conosolo v. Fed. Mar. Comm'n.*, 383 U.S. 607, 620 (1966).

93. See, e.g., *Elliott v. Sara Lee Corp.*, 190 F.3d 601, 606 (4th Cir. 1999) (standing for proposition that presence of conflicting evidence is not determinative in review of fiduciary's decision).

94. See, e.g., *Stup v. UNUM Life Ins. Co. of Am.*, 390 F.3d 301, 308 (4th Cir. 2004) (reiterating proper basis of review when plan administrator has latitude to interpret terms in plan); see also *Stawls v. Califano*, 596 F.2d 1209, 1212-13 (4th Cir. 1979) (finding lack of contemporaneous medical evidence is not dispositive for dismissing benefits claim). *Stawls* filed for disabilities stemming from schizophrenia under the Social Security Act. See *id.* at 1210. The Secretary of Health, Education and Welfare denied *Stawls* benefits on the grounds that she could not prove she was disabled as of June 30, 1962, the date she was last insured. See *id.* The basis

D. Former NFL Players Challenging Board Decisions Under ERISA Usually Lose

The majority of former NFL players who challenge the Board's decisions in federal court lose either at the trial or appellate level.⁹⁵ The lack of success in federal court appears to be attributable to the deferential standard of review given to Board decisions and the presence of conflicting medical evidence.⁹⁶

1. *Reversed At Appellate Level: Sweeney v. Bert Bell NFL Player Retirement Plan*⁹⁷ & *Williams v. Retirement Board of the Bert Bell-Pete Rozelle NFL Player Retirement Plan*⁹⁸

Walt Sweeney played in the NFL from 1963 to 1976 as a line-man on the San Diego Chargers and Washington Redskins.⁹⁹ During his playing career, Sweeney alleged that team doctors routinely gave him pain killers, leading to his drug dependency disability in 1976.¹⁰⁰ In addition, Sweeney alleged that a knee injury he suf-

for the Secretary's determination was the lack of any pre-1962 medical diagnosis of Stawls' disability. *See id.* at 1212-13. There were, however, numerous medical reports post-1962 that stated Stawls suffered from a mental disorder pre-1962. *See id.* at 1213. The Fourth Circuit remanded the case stating the Secretary must weigh the post-1962 medical reports in making a determination on whether Stawls was entitled to benefits. *See id.* For a similar argument made by the Plan in *Jani* which was also rejected by the Fourth Circuit, see *infra* notes 154-57 and accompanying text.

95. *See, e.g., Johnson v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 468 F.3d 1082 (8th Cir. 2006); *Boyd v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 410 F.3d 1173 (9th Cir. 2005); *Williams v. Retirement Board of the Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 61 F. App'x 362 (9th Cir. 2003); *Sweeney v. Bert Bell NFL Player Retirement Plan*, 156 F.3d 1238 (9th Cir. 1998); *Courson v. Bert Bell NFL Player Retirement Plan*, 75 F. Supp. 2d 424 (W.D. Pa. 1999), *aff'd* 214 F.3d 136 (3d Cir. 2000) (providing examples of NFL players who sued Plan in federal court and were unsuccessful).

96. For a further discussion highlighting why decisions of the Board are reviewed under an abuse of discretion standard of review, *see supra* 88-94 and accompanying text. *See generally, Boyd*, 410 F.3d 1173 (providing example of court weighing conflicting medical evidence regarding former NFL player).

97. 961 F. Supp. 1381, 1383 (S.D. Cal. 1997), *aff'd in part, rev'd in part*, 156 F.3d 1238 (9th Cir. 1998).

98. 61 F. App'x 362 (9th Cir. 2003).

99. *See* Walt Sweeney Past Stats, Statistics, History, and Awards - databaseFootball.com, <http://www.databasefootball.com/players/playerpage.htm?ilkid=SWEENWAL01> (last visited Nov.13, 2007) (displaying Sweeney's regular season statistics).

100. *See Sweeney*, 961 F. Supp. at 1385 (describing administration of drugs to players). The San Diego Chargers gave Sweeney Dexedrine, an amphetamine, and steroids starting in 1963. *See id.* In 1964, the team began giving its players Desbutol, a combination upper and downer. *See id.* In 1970, the team issued Desoxyn, pure speed, to its players. *See id.* When Sweeney complained to team trainers that the amphetamines made him depressed, the staff recommended he begin smoking marijuana. *See id.*

ferred in 1975 left him disabled.¹⁰¹ Sweeney filed for disability benefits from the league in 1989 and in 1993.¹⁰² After multiple examinations, submission of additional evidence, and appeals, the Board awarded Sweeney Inactive benefits and determined the year of T&P disability to be 1990.¹⁰³

Before the Board reached a final decision, Sweeney filed a suit under ERISA in the United States District Court for the Southern District of California.¹⁰⁴ The district court ultimately held that the Board abused its discretion in determining that Sweeney was not T&P disabled from 1976 to the present, with the exception of the period from 1984 to 1990.¹⁰⁵ The court also determined that Sweeney was entitled to Active benefits during the time periods in which he was T&P disabled.¹⁰⁶

On appeal, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") reversed in part and affirmed in part the

101. *See id.* (describing leg injury Sweeney suffered in final game of 1975 season). Although it appeared his leg healed during the off-season, Sweeney re-injured the same leg during pre-season of the 1976 season. *See id.*

102. *See id.* at 1387 (noting 1989 application was without legal representation and listed leg injury as sole reason for permanent disability). Sweeney's 1993 application was with legal representation and while he still claimed the leg injury was the cause of his disability he also submitted reports about his drug use and dependency. *See id.* (providing differences between 1989 and 1993 applications). Also, in 1993, the NFLPA and NFLMC negotiated a new collective bargaining agreement which merged the old retirement plan with the current Plan. *See Frazier v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, No. 97-460-P-C, 1997 U.S. Dist. LEXIS 21658, at *6 (D. Ala. Nov. 4, 1997).

103. *See Sweeney*, 961 F. Supp. at 1387-88 (summarizing disability application and appeals process for Sweeney). The Board tabled Sweeney's application three times before denying his claim in 1994. *See id.* at 1387. Sweeney appealed the decision and submitted additional medical and employment records per the Board's request. *See id.* In 1995, the Board made its final decision. *See id.* at 1388. The Board awarded Sweeney Inactive benefits and set the start date of his T&P disability at January 1, 1990. *See id.*

104. *See id.* at 1387 (chronicling Sweeney's early filing of ERISA suit). On July 28, 1994, Sweeney informed the Board of his intent to file an ERISA action. *See id.* Sweeney did file an ERISA action in state court on August 12, 1994. *See id.* The Board removed the case to federal court. *See* 28 U.S.C. § 1441 (2002) (permitting removal to district court in limited situations). The district court stayed Sweeney's action until the Board had reached a final decision. *See Sweeney*, 961 F. Supp. at 1387.

105. *See Sweeney*, 961 F. Supp. at 1391 (restating district court holding). The district court disagreed with the Board's conclusion that Sweeney was not T&P disabled between 1984 and 1990, but stated that the Board did not abuse its discretion in reaching this conclusion. *See id.* at 1393.

106. *See id.* at 1392 (supporting decision of Active benefits). The NFL teams' training staffs that administered drugs to Sweeney committed an assault on him. *See id.* "The causal connection between the injury and football is the basis for the 'Active Football' classification." *Id.*

decision of the lower court.¹⁰⁷ The Ninth Circuit reviewed Sweeney's medical and employment records and held that the Board did not abuse its discretion in determining that Sweeney was not T&P disabled between 1977 and 1984.¹⁰⁸ Moreover, it held that Sweeney's 1990 disability was not a relapse of his prior disability and, therefore, he should have received Inactive benefits from 1990 to the present instead of Active benefits.¹⁰⁹ Finally, the Ninth Circuit affirmed the district court's decision that Sweeney was not T&P disabled between 1984 and 1990.¹¹⁰

Similarly, in *Williams*, the Ninth Circuit reversed a decision of the District Court for the Northern District of California to award Delvin Williams \$180,000 in disability.¹¹¹ Williams played in the NFL from 1974 to 1981 as a running back for the San Francisco 49ers and the Miami Dolphins.¹¹² In support of the reversal, the Ninth Circuit found that Williams was able to perform "supervisory employment," a condition rendering him ineligible for benefits.¹¹³

107. See *Sweeney v. Bert Bell NFL Player Retirement Plan*, 156 F.3d 1238 (9th Cir. 1998) (announcing holding of Ninth Circuit).

108. See *id.* (detailing evidence Board relied on in making its determination). For a further discussion of the no employment qualification for disability benefits, see *supra* note 52 and accompanying text.

109. See *Sweeney*, 156 F.3d at 1238 (overruling district court's determination that Sweeney suffered from one, continuous disability). The Ninth Circuit held that the Board's determination that a T&P disability began as of January 1, 1990 was within its discretion. See *id.* Since Sweeney's injury arose more than twelve years after the date of his retirement and after he turned forty-five, the Board was correct to categorize Sweeney's benefits as Inactive under the terms of the Plan. See *id.*

110. See *id.* (affirming portion of district court's decision). Evidence that Sweeney earned over \$20,000 in 1989 disqualified him from receiving benefits between 1984 and 1989. See *id.*

111. See *Finder, Webster v. NFL*, *supra* note 18 (discussing Plan's victory in Ninth Circuit). Doug Ell argued successfully on behalf of the Plan to reverse the lower court's decision to award Williams disability benefits. See *id.*

112. See Delvin Williams Statistics – pro-football-reference.com, <http://www.pro-football-reference.com/players/WillDe01.htm> (last visited Nov. 13, 2007) (providing information on William's NFL career).

113. See *Williams v. Retirement Board of the Bert Bell/ Pete Rozelle NFL Player Retirement Plan*, 61 F. App'x 362, 362-63 (9th Cir. 2003) (determining Williams was capable of some types of employment). At issue was whether Williams was able to engage in any type of employment, a necessary requirement for finding a T&P disability. See *id.* Medical testimony established that Williams could engage in "supervisory or other sedentary work," but could not engage in "work which involves any significant requirement for lifting, stooping, stretching, bending, prolonged standing, or walking." *Id.* at 362-63 (quoting medical reports). Further, there was evidence that Williams had worked as an executive for three different employers. See *id.* The Ninth Circuit stated, "[a]ctual employment in sedentary positions demonstrates employability[.]" and reversed the lower court's decision to award Williams benefits. *Id.*

2. *Conflicting Evidence: Boyd v. Bert Bell/Pete Rozelle NFL Players Retirement Plan*¹¹⁴

Boyd was a UCLA offensive lineman drafted in the third round of the 1980 NFL draft by the Minnesota Vikings.¹¹⁵ In a preseason game during his rookie year, Boyd suffered a hit that left him momentarily unconscious and temporarily blind in his right eye; after skipping a few plays, the Vikings staff ordered Boyd back into the game.¹¹⁶ Boyd felt the initial effects of that hit in the form of headaches, dizziness, and memory loss, with his symptoms worsening after retiring from the NFL in 1986.¹¹⁷ In 2000, Boyd applied to the NFL for disability benefits. While the Board awarded Boyd Inactive benefits, it deferred consideration of his request for Degenerative benefits.¹¹⁸ Two Plan-neutral physicians examined Boyd and both determined that Boyd was disabled from a “football-related activity.”¹¹⁹ The Board, however, required Boyd to be examined by a third physician, Dr. Gordon, who opined that the medical evidence was inconclusive to determine the cause of Boyd’s mental disability.¹²⁰ Based on that testimony, the Board denied Boyd’s request for Degenerative benefits.¹²¹

114. 410 F.3d 1173 (9th Cir. 2005).

115. See Barr & Berko, *supra* note 13 (describing Boyd’s intellect and promise in NFL). Boyd graduated with honors from UCLA, mastered every position on the offensive line, and Vikings coaches initially praised his intellect. See *id.*

116. See *id.* (describing hit from preseason game at Orange Bowl). “The hit itself I don’t remember. I remember when I came to, I couldn’t see out of my right eye and I kind of panicked.” *Id.*

117. See *id.* (describing Boyd’s deteriorating mental condition). Boyd went from being able to memorize the duties of every position on the offensive line to struggling to remember teammates’ names. See *id.* After retirement, Boyd’s condition broke apart his marriage, led to increased drinking, and at times left him homeless. See *id.* “Here he was someone with all the potential to accomplish anything in the world and he couldn’t manage a sales job because he would have to pull to side [sic] of the road and fall asleep.” *Id.* (quoting Boyd’s therapist).

118. See *Boyd*, 410 F.3d at 1176 (providing Board’s determination of Boyd’s application). Boyd listed “organic brain problems” — allegedly caused by the hit in the preseason game — as the injury in his application for disability benefits. See *id.* at 1175.

119. See *id.* at 1176-77 (discussing various medical examiners’ opinions of Boyd). Dr. Ford, a Plan-neutral physician, stated that Boyd’s injury was a result of a football-related activity. See *id.* at 1176. Another plan neutral physician, Dr. Radisavljevic reached the same conclusion. See *id.* at 1177. In addition, two other physicians ran a brain scan on Boyd, at Boyd’s request, and concluded he was disabled due to a brain injury. See *id.*

120. See *id.* at 1177 (citing opinion of Dr. Gordon, third Board appointed physician to examine Boyd). After two days of extensive testing, Dr. Gordon concluded that Boyd’s depression could not to a “reasonable degree of medical probability” be caused by the hit in the preseason game. *Id.*

121. See *id.* (concluding Boyd’s injuries did not “arise out of League football activities”). The Board’s decision to have Boyd examined by three Plan-neutral

Boyd filed suit in federal court under ERISA in the hopes of still receiving disability benefits, but the district court granted summary judgment in favor of the Board.¹²² On appeal, the Ninth Circuit affirmed the district court's decision.¹²³ In support of its decision, the Ninth Circuit stated that the Board did not abuse its discretion by relying on the sole medical testimony of Dr. Gordon.¹²⁴ Further, the Ninth Circuit stated that ERISA litigation is not a "mere exercise in expert poll-taking" and that a single physician's medical testimony may constitute substantial evidence.¹²⁵

III. NARRATIVE ANALYSIS

After Webster's estate filed suit in federal court, both sides moved for summary judgment. The estate argued that Webster should be eligible for Active benefits, as opposed to Degenerative benefits, because every neurologist and psychologist that had examined Webster stated that he was T&P disabled as of the date he retired from the NFL.¹²⁶ Conversely, the Board argued Webster was not T&P injured "shortly after" he retired from the league be-

physicians led Boyd and others to question whether the Board was "doctor shopping" for a favorable medical opinion. *See* Barr & Berko, *supra* note 13. In response, Gene Upshaw, NFLPA Executive Director denied that the Board participates in "doctor shopping." *See id.* (claiming NFLPA has nothing to do with process of choosing examining doctors).

122. *See Boyd*, 410 F.3d 1178 (reiterating holding of district court).

123. *See id.* at 1179 (affirming district court).

124. *See id.* at 1178-79 (recounting analysis of Ninth Circuit). To find that the Board abused its discretion, the Ninth Circuit stated that the record must lead to a "definite and firm conviction that a mistake has been committed." *Id.* at 1178. The Ninth Circuit then stated that a review of the record showed that the cause of Boyd's injury was unclear. *See id.* at 1179. Boyd's disability was either caused by a football-related activity or a non-football related activity. *See id.* Because there was medical testimony to show that Boyd's disability may or may not have been caused by a football-related injury, the Board did not abuse its discretion in deciding that the disability was not a football-related injury. *See id.*

125. *See id.* ("We hold that a mere tally of experts is insufficient to demonstrate . . . [an abuse of discretion,] . . . for even a single persuasive medical opinion may constitute substantial evidence . . ."). The Ninth Circuit also noted that even the two physicians that had stated Boyd suffered injuries from playing football were unable to conclusively state the cause of Boyd's injuries. *See id.* For example, Dr. Ford stated Boyd was disabled as a result of a football injury, however, in his detailed narrative stated, "[Boyd] does appear to have several problems that *may* arise out of head injuries suffered in the course of his NFL career." *Id.* Dr. Ford concluded that more testing would be required to determine the extent of those injuries. *See id.*

126. For a further discussion of the differences between Active Benefits and Degenerative Benefits, see *supra* note 50 and accompanying text.

cause an oncologist who had been treating Webster since 1993 did not identify any cognitive impairment until 1996.¹²⁷

The district court began its review of the Board's decision with a lengthy look at the background of the case. It reviewed all of the medical evidence and summarized Webster's numerous interactions with the Board.¹²⁸ Next, the district court stated that an abuse of discretion standard of review applied in this case and then defined and listed factors to be considered under this standard of review.¹²⁹

Ultimately, the district court found that the Board had abused its discretion in denying Webster Active benefits and, therefore, granted summary judgment for Webster's estate.¹³⁰ The court stated that every neurological specialist that had examined Webster concluded he was T&P disabled by March 1991.¹³¹ Also, Webster had submitted "volumes of evidence" supporting his position that he had been T&P disabled since that date.¹³²

Further, the district court rejected the Board's argument that the presence of conflicting medical evidence supported its decision to deny Active Benefits and grant Degenerative benefits.¹³³ Specifically, the conflicting evidence the Board relied on was not substan-

127. See *Jani v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 209 F. App'x 305, 312 (4th Cir. 2006) (outlining Board's counterargument). The Board based its argument on the testimony of Dr. Marks, a hematologist and oncologist, who treated Webster for possible lymphoma starting in 1993. See *id.* at 310. After several months of treatment from Dr. Marks, Webster showed signs of improvement. See *id.* During a follow-up to the treatment in 1996, Dr. Marks stated Webster's "life has really deteriorated recently" and that Webster exhibited signs of depression - issues that were not present when he examined Webster in 1993. See *id.*

128. See *Jani v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, No. Civ. WDQ-04-1606, 2005 WL 1115250, at *2-4 (D. Md. Apr. 26, 2005) (summarizing examining doctors' medical opinions), *aff'd*, 209 F. App'x 305 (4th Cir. 2006).

129. See *id.* at *5 (adopting abuse of discretion standard of review from *Booth v. Wal-Mart Stores, Inc.*, 201 F.3d 335, 342-43 (4th Cir. 2000)). In *Booth*, the Fourth Circuit listed eight factors to guide a court in deciding whether a fiduciary abused its discretion. See *Booth*, 201 F.3d at 342-43.

130. See *Jani*, 2005 WL 1115250, at *6 (repeating holding of district court).

131. See *id.* at 6. For a further discussion of the definition of the term "T&P disabled," see *supra* note 51 and accompanying text.

132. See *Jani*, 2005 WL 1115250, at *6 (listing evidence supporting Webster's position). Webster submitted affidavits, Social Security records, and Internal Revenue Service records stating he was unable to work since 1991. See *id.* In addition, a private investigator, hired by the Board, interviewed Webster's business acquaintances and friends and concluded Webster was unsuccessful in all of his business ventures. See *id.*

133. See *id.* at *6 (rejecting conflicting medical testimony of Dr. Marks as substantial).

tial.¹³⁴ First, there was no evidence that the doctor whom the Board relied on had ever examined Webster's neurological functions before 1996.¹³⁵ Second, the fact that an oncologist did not notice Webster's mental condition prior to 1996 was insufficient evidence in light of the overwhelming amount of evidence showing the presence of Webster's mental disability at that time.¹³⁶ Because of the lack of substantial conflicting evidence, the district court held the Board could not justify its determination to award Webster Degenerative Benefits.¹³⁷

The Board appealed to the Fourth Circuit and made two arguments in support of a reversal of the district court's decision. First, the Board stated that Webster was, in fact, employed between 1991 and 1996 because of his broadcasting stint and job as the Kansas City Chiefs strength and conditioning coach and his self-employment; evidence that would render him ineligible for benefits during that time period.¹³⁸ Second, the Board argued that several doctors stated Webster was "generally in good health" during this same period.¹³⁹ The Fourth Circuit found both of these arguments unpersuasive and affirmed the district court's decision to grant Webster's estate Active benefits.¹⁴⁰

134. *See id.* For a further discussion of a case where a court agreed that the conflicting evidence relied upon by the Board was substantial, see *supra* notes 114-25 and accompanying text.

135. *See Jani*, 2005 WL 1115250, at *6 (dismissing medical testimony of Dr. Marks). Dr. Marks examined Webster for possible lymphoma in 1993. *See id.* at *4.

136. *See id.* at *6 (comparing Dr. Marks' medical testimony with testimony from numerous neurologists and psychologists).

137. *See id.* (rejecting medical testimony of Dr. Marks as "substantial conflicting evidence").

138. *See Jani v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 209 F. App'x 305, 315 (4th Cir. 2006) (arguing Webster was not T&P disabled at beginning of his retirement). For a further discussion of the definition of T&P disabled and specifically the requirement that a player be "substantially unable to engage in any occupation or employment for remuneration of profit," see *supra* notes 51-52 and accompanying text. The Fourth Circuit classified Webster's broadcasting stint as a failed audition and stated his job with the Kansas City Chiefs fell within the exception outlined in the Plan regarding certain types of employment given out of benevolence. *See Jani*, 209 F. App'x at 315.

139. *See Jani*, 209 F. App'x. at 316 (favoring testimony from examining psychologists and neurologists). The Fourth Circuit explained that the doctors who remarked Webster was "generally in good health" were not qualified to comment on his mental health. *See id.* Similar to the district court, the Fourth Circuit was not persuaded by the medical testimony of Dr. Marks. *See id.*

140. *See id.* (questioning Board's decision to ignore medical evidence from its own expert). The Board stated that it accepted Dr. Westbrook's determination that Webster was T&P disabled, however, chose not to accept Dr. Westbrook's determination of when Webster became T&P disabled. *See id.* at 316 n.7 (noting unreasonableness of Board's parsing of Dr. Westbrook's opinions). In defense of its position, the Plan argued that it often utilizes Plan-neutral physicians only to

IV. CRITICAL ANALYSIS

The Fourth Circuit's decision in *Jani* affirming the district court's determination that the Board had abused its discretion represents the first defeat for the Board at the appellate level in pension litigation under ERISA.¹⁴¹ The decision was also a major victory for Webster's family: part of the estimated \$1.5 million award will be used to recover Webster's four Super Bowl rings which are being held as collateral by a defense attorney.¹⁴²

A legal analysis of the holding in *Jani*, however, reveals that it is fairly narrow and questions what, if any, precedence it will have for other players challenging the Board in federal court.¹⁴³

The holding is narrow because of the specific facts of Webster's case; there was unanimous relevant medical evidence that Webster was T&P disabled.¹⁴⁴ This fact was embodied in the court's holding which stated that the Board, as a fiduciary, abuses its discretion when it ignores unanimous medical evidence.¹⁴⁵ Although a fiduciary can rely on conflicting evidence –as long as the evidence is sub-

determine whether a player is disabled and not to determine when a player became disabled. *See id.* at 317 n.8. The Fourth Circuit rejected this position stating that in eight other cases involving brain injuries, the Board accepted a Plan-neutral's determination of whether a player was T&P disabled as well as the onset date. *See id.* (explaining record belied Board's claim); *see also* *Donovan v. Eaton Corp., Long Term Disability Plan*, 462 F.3d 321, 329 (4th Cir. 2006) (finding factually similar decision by fiduciary to be abuse of discretion). In *Donovan*, the Fourth Circuit held that a fiduciary abuses its discretion if it credits a doctor's earlier, incomplete testimony and then discredits the same doctor's later, comprehensive opinion. *See id.*

141. *See* Garber, *Family, Friends React*, *supra* note 15 (quoting Cyril Smith, one attorney that argued for Webster's estate: "[t]his is the first time an appeals court has so emphatically – or ever – rejected the NFL's denial of these types of benefits"). It is estimated that the award to Webster's estate could be close to \$2 million. *See id.*

142. *See id.* (reporting extent of award against NFL). The NFL was required to pay medical bills and attorney fees. *See id.* The remainder of the award will be split amongst Webster's ex-wife, four children and Jani. *See id.*

143. For a further discussion of the narrow holding of the *Jani* case, *see infra* notes 144-48 and accompanying text. *But see*, Garber, *Family, Friends React*, *supra* note 15 ("There is now an avenue of redress to be properly compensated, just like any other workplace in this country. These players give their body and souls for this job. Now, there's some hope for people with these injuries and disabilities.") *Id.* (quoting one attorney for Webster's estate, Robert Fitzsimmons).

144. *See generally* *Jani v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, No. Civ. WDQ-04-1606, 2005 WL 1115250, at *5 (D. Md. Apr. 26, 2005) (accepting unanimous medical testimony of neurologists and psychologists who examined Webster), *aff'd*, 209 F. App'x 305 (4th Cir. 2006).

145. *See* Garber, *Family, Friends React*, *supra* note 15 (reporting thoughts of NFL spokesman, Greg Aiello). Mr. Aiello downplayed the decision stating it was a "narrow issue." *See id.*

stantial- it cannot ignore unanimous relevant evidence.¹⁴⁶ This principle appears to be well settled and the Fourth Circuit cited to numerous opinions reaching an identical conclusion.¹⁴⁷ Almost always, however, a court reviewing a Board's decision will be presented with conflicting medical evidence about a former player's medical history.¹⁴⁸ Therefore, *Jani* may be of little assistance to players challenging a Board's decision in federal court when conflicting medical evidence is present.

Conversely, the opinion may assist players filing in court because it does limit the type of medical evidence the Board can rely on as substantial evidence.¹⁴⁹ In past cases such as *Boyd*, courts have upheld a decision of the Board founded on the lone medical testimony of an examining physician.¹⁵⁰ In *Jani*, the Board made a similar argument, using the medical testimony of Drs. Marks and Conn to demonstrate that Webster's health did not begin to really deteriorate until years after he retired.¹⁵¹ Both courts questioned and rejected the testimony of these doctors.¹⁵² One concern was whether either doctor was qualified to comment on Webster's neurological functions and the other concern was whether Dr. Marks had ever examined Webster's neurological functions before

146. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 529 (4th Cir. 1998) (outlining Fourth Circuit's handling of unanimous medical evidence to prove total disability under disability plan with similar language). A miner can establish a "totally disabling respiratory condition" under the Black Lung Benefits Act with unanimous medical evidence showing the miner suffers that condition. See *id.* Further, if contrary medical evidence exists, then it must be weighed against the evidence establishing the miner has a "totally disabling respiratory condition." See *id.*

147. See *Jani v. The Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 209 F. App'x 305, 314-15 (4th Cir. 2006) (recounting Fourth Circuit jurisprudence regarding unanimous medical evidence in benefits determination litigation).

148. See, e.g., *Boyd v. Bert Bell/Pete Rozelle NFL Players Retirement Plan*, 410 F.3d 1173 (9th Cir. 2005) (presenting case where conflicting medical evidence was present).

149. For a further discussion of two limitations imposed on a fiduciary when faced with conflicting medical evidence, see *infra* notes 153-57 and accompanying text.

150. See *Boyd*, 410 F.3d at 1179 (reasoning Board did not abuse discretion). The Board relied on the medical testimony of Dr. Gordon. See *id.* at 1177. *Boyd* claims much of Dr. Gordon's examination was actually preformed "by an ill-prepared graduate student." See Barr & Berko *supra* note 13 (describing *Boyd*'s claim that Board "doctor shopped" until it could get contrary opinion).

151. See *Jani*, 209 F. App'x at 310 (summarizing medical opinions of Drs. Marks and Conn). Dr. Conn performed an echocardiogram on Webster in 1994. See *id.*

152. See *id.* at 316 (rejecting medical testimony of Drs. Marks and Conn). The Fourth Circuit stated neither doctor was asked or qualified to comment on Webster's mental health. See *id.*

1996.¹⁵³ Further, the Fourth Circuit attacked the Board's decision to disregard the medical opinion of the Plan-neutral physician.¹⁵⁴ Specifically, the Fourth Circuit stated the Board could not rely on the doctor's earlier, incomplete evaluation and then ignore the same doctor's later, complete evaluation.¹⁵⁵ In addition, the Board must not only accept the Plan-neutral physician's diagnosis, but must also accept the onset date determined by that physician.¹⁵⁶ Therefore, while determining disability benefits may not simply be an "exercise in expert poll-taking," the *Jani* court did identify some restrictions for the type of medical evidence which qualifies as substantial evidence.¹⁵⁷

Finally, the *Jani* opinion is unpublished and therefore, despite giving players some guidance in what constitutes substantial evidence, there may be little, if any, real precedential value.¹⁵⁸ This case does have value, however, outside the legal realm. Webster's court victory has given hope to other players having similar grievances with the Board and has attracted additional attention to the increasingly public dispute between former players and the NFL.¹⁵⁹

153. See *Jani v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, No. Civ. WDQ-04-1606, 2005 WL 1115250, at *6 (D. Md. Apr. 26, 2005) (questioning whether Dr. Marks previously examined Webster's neurological functions), *aff'd*, 209 F. App'x 305 (4th Cir. 2006). Further, Dr. Conn reported Webster was "capable of most physical activities that would be relevant to his age." See *Jani*, 209 F. App'x at 310. There was no evidence, however, that Dr. Conn examined Webster's neurological functions. See *id.* at 316.

154. See *Jani*, 209 F. App'x at 316 (questioning Board as to why it disregarded its own expert).

155. See *id.* at 314 (citing *Donovan v. Eaton Corp.*, Long Term Disability Plan, 462 F.3d 321, 329 (4th Cir. 2006) (reconciling situation where one physician examines patient multiple times). A fiduciary will abuse its discretion when it relies on a doctor's earlier, incomplete evaluation of a patient, but dismisses the same doctor's later, complete evaluation of the same patient. See *id.*

156. See *id.* at 317 n.8 (citing evidence that Board relies on Plan-neutral physician for determination of onset date of disability).

157. See *id.* at 316-17 (outlining situations where reliance on conflicting medical testimony is not substantial evidence). The Board requested that the court disregard the testimony of its own medical examiner. See *id.* at 316. The reason the Board gave for not relying on its own medical examiner's observations is that the examiner's observations were not made at the time of Webster's retirement. See *id.* The Fourth Circuit declined to adopt the position that lack of contemporaneous medical evidence is substantial evidence to disqualify a player from being eligible for benefits. See *id.* at 316-17.

158. See 4TH CIR. R. 36(b) (explaining Fourth Circuit's treatment of unpublished opinions). Rules of the Fourth Circuit disfavor citation to unpublished opinions except when counsel finds an unpublished opinion applicable to a case and there is not an applicable published opinion. See *id.*

159. See Garber, *Family, Friends React*, *supra* note 15 (illustrating hope Webster's victory has given to other players in similar situations). Webster's son, Garrett stated he received numerous emails from other retired players who are fighting the NFL for better benefits. See *id.*

V. IMPACT

Tension has grown between retired players and the NFLPA over whether the league has adequately compensated retired players that are injured.¹⁶⁰ Recently, some former players and coaches, such as Mike Ditka, took their frustrations with the league and the NFLPA before a House of Representatives subcommittee to illustrate why, in their opinion, the NFL undercompensates or even ignores injured, retired players.¹⁶¹ The NFL and NFLPA countered that disability benefits have been increased in recent years and admitted that it will be impossible to please every former player who is injured because in a contact sport such as football, the league must draw lines between injuries that are compensable and injuries that are not compensable.¹⁶² This section examines both sides of the debate and concludes that one way to improve disability benefits for former players is to get current players involved.¹⁶³

A. Former Players: The NFL Has Forgotten Us

Many former players believe the NFL has ignored them and their injuries.¹⁶⁴ Their main grievance is that the Board rarely classifies an injured player as disabled.¹⁶⁵ Empirical evidence appears

160. See Finder, *NFL's Disability Plan*, *supra* note 30 (espousing sentiments of many ex-players). "The plan is an area of contention for many former players, who utter . . . the same criticism: Off a roster, out of mind." *Id.*

161. See Alan Schwarz, *Congress Scolds N.F.L. and Union*, N.Y. TIMES, June 27, 2007, at D5 [hereinafter Schwarz, *Congress*] (summarizing June 26, 2007 hearing before House subcommittee). Players including Boyd, Marsh and Harry Carson as well as Webster's lawyer detailed their grievances with the Board during a two hour hearing before the House Judiciary Subcommittee on Commercial and Administrative Law. *See id.*

162. *See id.* (quoting portions of testimony from Doug Ell and Dennis Curran, NFL senior vice president). Ell stated, "Gene [Upshaw's] very frustrated because it seems like no matter what he does, he can't satisfy the players." *Id.*

163. *See id.* (listing other proposed remedies offered by subcommittee). Possible legislative remedies, expedited arbitration and permitting former players increased involvement in benefits administration were all mentioned by the subcommittee as possibilities to fix the current situation. *See id.*

164. See Ken Murray, *The NFL's Forgotten Players*, BALT. SUN July 2, 2006 at 1D (noting entire generation of NFL players feel abandoned by league); *see also*, Schwarz, *Concussions*, *supra* note 44 (referring to physical and psychological effects of concussions). Brent Boyd testified before the House subcommittee: "[t]he NFL is trying to distance themselves from liability for all the carnage left behind by our N.F.L. concussions — just as tobacco companies fought like hell to deny the links between smoking and cancer." *Id.*

165. See Garber, *Family, Friends React*, *supra* note 15 (stating Webster's son maintained his father's lawsuit in part because of encouragement from other former players). Garrett Webster, Mike Webster's son, states cynicism among former players is high with many of them asking "if you had to die or fall into a coma to get this benefit." *Id.*

to support this assertion: of the 3,500 retired players represented, less than one-percent qualify for full disability.¹⁶⁶ Players often cite the NFL's authority to define an injury as the reason why so few players receive benefits.¹⁶⁷ An additional criticism is that the NFLPA "doctor shops" until it finds a doctor who will testify that a player was not injured by playing football and then the Board will use that doctor's testimony as evidence to deny a player disability benefits.¹⁶⁸

Even former players that do receive disability benefits are often unhappy with the NFLPA and the Board. Benefits for a permanently injured player average \$63,000 annually, an inadequate amount according to many former players.¹⁶⁹ Other players who receive benefits complain that the NFL continues to scrutinize them to determine if they still qualify for benefits.¹⁷⁰ For example, Curt Marsh, an offensive guard on the Oakland Raiders' 1983 Super Bowl team, suffered a career-ending ankle injury in 1987 and eventually had his right leg amputated.¹⁷¹ Marsh qualified for disability benefits, but says the Plan still requires him to be examined every year to see if he is still disabled.¹⁷²

Recently, Congress and the Fourth Circuit have joined former NFL players in questioning and criticizing the league's administration of disability benefits. A House of Representatives subcommittee hearing in June 2007 resulted in heavy criticism of the Board

166. See Lopez, *supra* note 16 (quoting survey results from 2005 Pittsburgh Post-Gazette study). The study concluded that only 130 former players earn full disabilities from the league. See *id.* In comparison, a survey of thirty attorneys that represent players in disability cases estimated that fifty to sixty-five percent of retired players have suffered a permanent injury. See Logan, *supra* note 29 (suggesting large disparity between number of injured former players and number of former players receiving benefits).

167. See Garber, *Family, Friends React*, *supra* note 15 (criticizing NFL's power to define disabilities); see also Sweeney v. Bert Bell NFL Retirement Plan, 961 F. Supp. 1381, 1384 (S.D. Cal. 1997) (explaining Plan gives Board authority to interpret all terms in Plan), *aff'd in part, rev'd in part*, 156 F.3d 1238 (9th Cir. 1998).

168. See Barr & Berko, *supra* note 13 (expressing Boyd's criticism of Board's alleged practice). Boyd argues that an unprepared graduate student, in large part, conducted the third medical examination. See *id.* The Board relied on this medical examination to make its decision on his benefits. See *id.*

169. See Schwarz, *Congress*, *supra* note 161 (calling current benefit amounts "pitiful"). The Plan pays roughly \$20 million in benefits to 317 retirees. See *id.*

170. See Finder, *NFL's Disability Plan*, *supra* note 30 (requiring players receiving disability to be reevaluated by doctor to confirm disability still exists).

171. See *id.* (noting injuries of Marsh). In addition to his leg being amputated, Marsh had his hip replaced, several lower-back surgeries, a plate inserted into his neck and screws in his arms. See *id.*

172. See *id.* ("Every year, they have you go in — every single year — to have the doctor look at you to see if you're still disabled[.]"). Marsh jokes that every year he is examined by a doctor to see if his leg has grown back. See *id.*

from both Republicans and Democrats.¹⁷³ Similarly, the Fourth Circuit found the Board abused its discretion when it overlooked *unanimous medical evidence* to deny Webster a higher category of benefits.¹⁷⁴

B. The Board: “[T]he Plan does a very good deal. It pays out a lot of money in disability benefits to players.”¹⁷⁵

In response to the mounting criticism, the NFLPA states that as a fiduciary it cannot simply award disability benefits to every retired player that is injured from playing football.¹⁷⁶ The NFLPA also points out that in recent years it has made efforts to improve benefits for retired players. For example, the 1993 collective bargaining agreements instituted a new category of disabilities and monthly pension benefits were increased for pre-1977 players in 2006.¹⁷⁷ Further, two new sections which will improve benefits were added to the 2006 Amended Collective Bargaining Agreement.¹⁷⁸

173. See Schwarz, *Congress*, *supra* note 161 (reporting subcommittee’s reaction to testimonies). It was apparent that the subcommittee members sided with the former players, offering that they would consider legislative remedies. See *id.*

174. See Garber, *Family, Friends React*, *supra* note 15 (reporting holding of Fourth Circuit). One judge on the three-judge panel that heard the appeal even stated the Plan’s conduct “‘indicates culpable conduct, if not bad faith.’” See Schwarz, *Congress*, *supra* note 161.

175. Finder, *Webster v. NFL*, *supra* note 18. (quoting Doug Ell, lawyer and representative of Plan). Further, Greg Aiello touts the generosity of the Plan, stating “I think you would find in business it’s rare for companies to reach back and improve benefits for former employees.” See Ron Kroichick, *Glory has its Price: The 1981 49ers Benefits Battle*, S.F. CHRON., Jan. 21, 2007, at D11 (providing NFLPA’s response to criticisms about benefits for former players).

176. See 29 U.S.C. § 1104(a)(1)(B) (2007) (defining “prudent man standard of care” for fiduciary). A fiduciary shall act “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims[.]” *Id.*

177. For a thorough description of the history and shortfalls of the NFL Pension plan, see HISTORY OF RETIREMENT AND T&P BENEFITS FOR NFL PLAYERS, *supra* note 46. Despite the increases, the NFL’s pension pays less than what Major League Baseball’s pension plan pays to its retired players. See Lopez, *supra* note 16 (comparing NFL pension to pensions of other major sports).

178. See Article XLVIII-D, 88 Benefit, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS ASSOCIATION (2006), http://www.nflpa.org/pdfs/Agents/CBA_Amended_2006.pdf (establishing 88 Benefit and potential NFL Players Benefit Committee). The 88 Benefit, which became effective on February 1, 2007, provides additional assistance to players suffering from dementia. See *id.* (detailing new type of benefit available to former players). In addition, the proposed NFL Player Benefits Committee would provide services that are currently performed by the Plan’s office located in Baltimore, Maryland. See NFL Player Benefits Committee, http://www.nflpa.org/cba/cba_pdf/ARTICLE_XLVIII-E_NFL_Players_Benefits_Committee.pdf (last visited Nov.

The NFLPA also defends the Board's actions by maintaining that it is a neutral decision-making body.¹⁷⁹ First, the composition of the Board promotes neutrality; of the six person Board, three members are selected by NFL management and three members are selected by the players.¹⁸⁰ Second, decisions of the Board must be unanimous. If the Board is deadlocked, the issue is submitted to a MAP whose opinion is binding on the Board.¹⁸¹ Regarding the Board's decision on Webster's benefits, NFL spokesman Greg Aiello stated that all six members had a different view of the situation but did reach a unanimous decision.¹⁸² In addition, he stated that the Board didn't deny Webster benefits, it just didn't award him the highest level of benefits.¹⁸³

13, 2007) (proposing additional improvement to current process for administering benefits).

179. *See Sweeney v. Bert Bell NFL Retirement Plan*, 961 F. Supp. 1381, 1384 (S.D. Cal. 1997) (detailing composition of Board), *aff'd in part, rev'd in part*, 156 F.3d 1238 (9th Cir. 1998). Retired players have requested that they be given a representative on the Board, but requests have been brushed aside. *See Lopez, supra* note 16 (voicing former players' grievance about lack of representation on Board).

180. *See Sweeney*, 961 F. Supp. at 1384 (showing equal appointees by NFLPA and NFLMC ensure neutrality in determining disability awards). Although retired players are unable to nominate someone to sit on the Board, they have been told by Gene Upshaw that he is their voice. *But see Lopez, supra* note 16 (noting Upshaw has reportedly stated that he does not represent retired players).

181. *See Johnson v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 468 F.3d 1082, 1084 (8th Cir. 2006) (citing provision in Plan to alleviate deadlocked decisions of Board). If the Board cannot reach a majority decision, the Plan provides for a MAP to examine the player. *See id.* The Board is then bound by the MAP's determination of whether a player is T&P disabled, but the Eighth Circuit determined that the Board is not bound to the date a MAP sets as the T&P disability start date. *See id.* at 1086. Two reasons were given to support this position: (1) a MAP may not be able to determine the start date for when a player is T&P disabled because other information may be required such as employment records and (2) the report the MAP creates does not provide a space for listing the onset date of a player's T&P disability. *See id.* *But see Jani v. Bert Bell/ Pete Rozelle NFL Player Retirement Plan*, 209 F. App'x 305, 317 n.8 (4th Cir. 2006) (reaching opposite conclusion that Board has followed MAP's onset date for T&P injury in other cases).

182. *See Garber, Family, Friends React, supra* note 15 (providing Aiello's thoughts on case). For a further discussion of the Board's rulings regarding Webster's disabilities, *see supra* notes 71-75 and accompanying text.

183. *See Garber, Family, Friends React, supra* note 15 (quoting Gene Upshaw) ("We all feel badly for what happened to Mike Webster, but obviously there are a lot of players who go through similar circumstances [Y]ou just don't award a benefit to someone who is going through a tough time. That's not how it works.").

VI. CONCLUSION

NFL players from Mike Webster's generation are frustrated because they feel neglected by the NFL.¹⁸⁴ Adding to these players' frustration is the inability to challenge decisions of the Board in court because of the current Plan's language and the statutory limitations under ERISA.¹⁸⁵ One solution which would not be subjected to these judicial restraints would be to renegotiate the terms of the Plan.¹⁸⁶ This solution, however, would ultimately require co-operation from current players.

The current Plan is in large part a product of the 1993 collective bargaining agreement between the NFLPA and the NFLMC.¹⁸⁷ Neither party, however, represents retired players. Gene Upshaw, the head of the NFLPA, has repeatedly and emphatically stated that the NFLPA only represents current players.¹⁸⁸ While current players have received numerous benefits through collective bargaining, similar benefits have notably been less forthcoming for retired players.¹⁸⁹ Therefore, the ability to improve benefits for retired players

184. See Lopez, *supra* note 16 (highlighting current success of NFL). Forbes magazine has valued NFL franchises at an average of \$820 million a piece. See *id.* The NFL is a \$6 billion a year industry with television and multimedia contracts estimated to generate \$24 billion over the next eight years. See *id.*

185. See Sweeney v. Bert Bell NFL Player Retirement Plan, 961 F. Supp. 1381, 1390 (S.D. Cal. 1997) (outlining appropriate standard of review), *aff'd in part, rev'd in part*, 156 F.3d 1238 (9th Cir. 1998). The Board has "discretionary authority to determine eligibility for benefits The abuse of discretion standard is thus the appropriate standard of review" *Id.*

186. See Article XLVII, Retirement Plan, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS ASSOCIATION (2006), *supra* note 178 at 135 (incorporating Plan into 2006 Collective Bargaining Agreement).

187. See *id.* at preamble (2006) (providing example of draft of 2006 collective bargaining agreement). The Preamble lists all of the entities that the NFLPA represents:

1. All professional football players employed by a member club of the National Football League;
2. All professional football players who have been previously employed by a member club of the National Football League who are seeking employment with an NFL Club;
3. All rookie players once they are selected in the current year's NFL College Draft; and
4. All undrafted rookie players once they commence negotiation with an NFL Club concerning employment as a player.

Id.

188. See Lopez, *supra* note 16 (highlighting former players' frustrations with NFLPA and Gene Upshaw specifically). The mission statement of the NFLPA includes the statement, "We pay homage to our predecessors for their courage, sacrifice and vision." *Id.* But see Murray, *supra* note 164 (suggesting principles of labor law only permit NFLPA to represent current players, not former players).

189. See Lopez, *supra* note 16 (listing improvements in benefits for current NFL players). The recent collective bargaining talks have given current players

may ultimately fall into the hands of current players. This prompts many former players, such as Art Kuehn, to encourage current players to take responsibility “to take care of the ones who came before you.”¹⁹⁰

VII. POSTSCRIPT

As the 2007 NFL season kicked off in early September, the NFLPA was in the midst of a campaign to combat the mounting public criticism it had received over its handling of disability benefits for former players.¹⁹¹ On the offensive side, the NFLPA announced a four-point program in July 2007 to improve benefits for former players.¹⁹² Further, the NFLPA launched a website dedicated to defending itself by separating fact from fiction regarding the disability process as well as the interactions between the Board and former players such as Webster and Boyd.¹⁹³ Current players have also agreed to help, voluntarily giving up \$147.5 million in salary to assist former players.¹⁹⁴ Finally, and perhaps most signifi-

401(k) plans, annuities, and better benefits. *See id.* But *see* Murray, *supra* note 164 (evidencing benefits have improved for former players at expense of current players). In 2002, benefits doubled for players who were in the NFL before 1968. *See id.* Their benefits doubled, from \$100 to \$200 per month for every credited season. *See id.* This increase of \$110 million came out of current player benefits. *See id.*

190. Greg Bishop, *Pension Tension Players Split on Benefit Amount*, SEATTLE TIMES, Dec. 18, 2006 at C7, available at <http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=pension18&date=20061218&query=pension+tension> (quoting former NFL player). Bruce Laird, former Indianapolis Colts safety hopes to improve dialogue between current and former players. *See* Murray, *supra* note 164. Laird states that the dialogue is “virtually nonexistent.” *Id.*

191. *See, e.g.*, The NFLPA Truth Squad: Facts vs. Fiction, <http://www.nflpa.org/truth/> (last visited Oct. 1, 2007) (providing forum for NFLPA to explain their side of story regarding current benefits controversy).

192. *See* Press Release, NFLPA, NFLPA and NFL Announce New Retirement Benefits Initiatives (July 25, 2007), http://www.nflpa.org/pdfs/NewsAndEvents/MediaReleases/Meeting_with_Retired_Players_July_25.pdf (announcing NFLPA’s latest improvements of benefits for former players). The four-point program established a retired player’s medical fund and a cardiovascular health program for former players. *See id.* In addition, the NFLPA stated it is committed to improving and expediting the disability procedures and is exploring post-retirement health insurance options for players. *See id.* A highlight of the retired player’s medical fund is that it will use \$7 million to provide free joint replacement surgery for former players. *See id.*

193. *See* The NFLPA Truth Squad: Facts vs. Fiction, *supra* note 191 (providing forum for NFLPA to rebut “misinformation” from former players and media). The site also provides links to Gene Upshaw’s September 2007 Senate testimony, NFLPA press releases, and information relating to Boyd’s interactions with the Board including the federal court opinions and Dr. Gordon’s medical report. *See id.*

194. *See* Press Release, NFLPA, NFL Players Association Chief Gene Upshaw Cites “Dramatically Improved Pension and Disability Benefits” Since 1993 for Re-

cantly, in the bitter feud between some former players and the NFLPA, it appears that a middle ground may be attainable. At a September 18, 2007 hearing before a Senate subcommittee, Gene Upshaw began by defending the NFLPA and the Board, but then asked Congress for help in improving the benefits process.¹⁹⁵ Therefore, while former players and the NFLPA may disagree on just how broken the current benefits system is, it appears both parties are willing to improve the process.¹⁹⁶

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tired Players in Senate Testimony (Sept. 18, 2007), http://www.nflpa.org/Truth/pdfs/Sept.18_Press_Release.pdf (highlighting every active player reduced his salary by \$82,000).

195. See GENE UPSHAW TESTIMONY FOR SENATE (Sept. 18, 2007) http://www.nflpa.org/Truth/pdfs/Gene_Upshaw_Testimony_for_Senate_Sept.18.PDF (transcribing Upshaw's testimony before Senate Subcommittee on Commerce, Science and Transportation). Upshaw used the majority of his testimony to list the numerous improvements the NFLPA has instituted to its disability system. See *id.* He concluded by asking Congress to help by making legislative changes to existing labor law. See *id.* Comments from senators present at the hearing, however, suggest Congress is not interested in getting involved in the situation. See Lester Munson, *Ex-Players, League Officials Find Common Ground*, ESPN.COM, Sept. 18, 2007, http://sports.espn.go.com/nfl/columns/story?columnist=munson_lester&id=3026092 (quoting Senator John Kerry) ("I hope we never have to act and set up some sort of accountability People must wonder why we are even in this. My hope is the league will act.").

196. See Munson, *supra* note 195 (suggesting NFLPA and former players both agree benefits system can be improved).

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